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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 768

THE BOYS MARKETS, INC., *Petitioner,*

v.

RETAIL CLERKS UNION, LOCAL 770

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus* in support of the position of Retail Clerks Union Local 770 is filed, with the consent of the parties, as provided for in Rule 42(2) of this Court, by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federaion of 121 national and international unions having a total membership of approximately thirteen and one-half million working men and women.

SUMMARY OF ARGUMENT

1. In *Sinclair* v. *Atkinson,* 370 U.S. 195,203 (1962), this Court held that in enacting §301 of the Labor Management Relations Act Congress specifically faced the question of whether the Norris-LaGuardia Act's ban on injunctive relief against breach of contract strikes should be repealed

and, "that §301 was not intended to have any such partially repealing effect upon such a long-standing, carefully thought out and highly significant part of this country's labor legislation."

All the arguments which could be summoned in opposition to the majority's conclusion are stated in the *Sinclair* dissent. There has not been a single legislative or judicial development since 1962 which would justify a reassessment of this Court's determination as to what the legislative judgment on the proper role of Norris-LaGuardia had been in 1947.

As the majority opinion makes clear, *Sinclair* is not an expression of this Court's policy judgments; it is, instead, an expression of judicial deference to the legislature in an area where the latter is preeminent. The regulation of the economic weapons of management and labor, like economic regulation generally, has an inherent potential for doctrinal instability because this area is characterized by "strong contending forces and deeply held views." *Local 1976 Carpenters* v. *National Labor Relations Board*, 357 U.S. 93, 99 (1958). And these forces constantly seek to protect their self-interest with the weapon at hand. Thus, should this Court indicate that it is willing to change that which has been deemed to have been settled by Congress, the result will be to increase the resources utilized to win lost legislative battles in the courts.

In light of the above, every relevant consideration militates in favor of following the doctrine of *stare decisis* in the instant case.

2. Assuming, *arguendo*, that *stare decisis* does not control and that the issue presented here is to be viewed as *res nova*, the conclusion still follows that *Sinclair* should be reaffirmed.

We start from the position that the fundamentals of Norris-LaGuardia and the federal law of labor arbitration are basically consistent. The premise of both is that the judiciary is unsuited to the task of setting the basic substantive rules which govern the conduct of the parties to a labor dispute, and that the public interest is best served by the utilization of methods of dispute settlement other than litigation. Enactment of Norris-LaGuardia constituted "clear disapproval of [the] free wheeling judicial exercises" which had characterized the era which was brought to a close in 1932. *Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 382 (1969). And the federal law of labor arbitration is based on the recognition that the courts should not administer collective agreements, and that §203(d) calls for judicial action which to the maximum extent feasible simply remits the parties to the arbitral process, *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960).

At the practical level, too, Norris-LaGuardia's ban on injunctive relief conforms with the way arbitration works. Under almost all collective agreements, the employer is free to act in the first instance—to administer the agreement in accordance with his views as to its meaning. There is, therefore, no lack of parity in the present situation. Norris-LaGuardia prevents either party from obtaining a judicial order requiring the other to conduct itself in accordance with the substantive provisions of the agreement; it permits either party to obtain against the other a judicial order requiring the use of the agreed-upon method of adjudicating whether actions that have been taken are in violation of the agreement, see, *Clure* v. *Publishers Assn. of N.Y.*, 314 F. 2d 343 (C.A. 2nd Cir., 1963), *affirming per curiam*, 214 F. Supp. 520 (U.S.D.C. S.D.N.Y., 1963).

3. As its form demonstrates, Norris-LaGuardia was not simply a repudiation of the substance of the general labor

law evolved by the courts, it was also a condemnation of a particular procedural device—the injunction. In enacting Norris-LaGuardia "Congress was intent upon taking the federal courts out of the labor injunctions business," *Marine Cooks* v. *Panama S.S. Co.* 362 U.S. 365, 369 (1960).

The temporary restraining order and the preliminary injunction are inherently inappropriate methods for deciding labor disputes. Their disrepute is not the product of a particular era:

> "Despite the numerous and extensive procedural reforms introduced by the Norris-LaGuardia Act and its counterparts in a number of states, it remains a fact that the labor injunction, by its very nature, is a form of judicial power peculiarly subject to abuse." Aaron, *Labor Injunctions In the State Courts—Part II: A Critique,* 50 Va. L. Rev. 1147, 1156 (1964).

Strikes do not come neatly labeled as breach of contract strike over an underlying matter which is subject to arbitration and which after balancing the equities should be enjoined. There are four dimensions to the problem of when, and what type, of an injunction should be issued.

First, in light of the language of the collective agreement and applicable public law, is there a breach of the no-strike clause? See, e.g., *Mastro Plastics Corp.* v. *National Labor Relation Board,* 350 U.S. 270 (1956); *Drake Bakeries* v. *Local 50 Bakery Workers,* 370 U.S. 254, 266 (1962).

Second, is the underlying dispute arbitrable? One-third of the employees working under major collective bargaining agreements are covered by clauses which leave one or more dispute issues non-arbitrable. The exact limits of what has been made subject to, and what has been specifically excluded from arbitration, is highly ambiguous.

Third, under *Locomotive Engineers* v. *M.K.T. R.R. Co.,* 363 U.S. 528, 531-532 (1960), it is now settled that in hearing

an application for an injunction against a breach of contract strike, the district court, in order "to ensure that extraordinary equitable remedies will not become the engines of injustice [is] free to exercise the typical powers of a court of equity."

Finally, if the union in question has fully met its responsibilities and the strike is a true "wildcat" the district court becomes the agency which requires individual employees to work against their will. The utility of this role is questionable and damage it would have on the prestige of the courts is plain to anyone who remembers the effects of "government by injunction."

Thus, "authorizing strike injunctions in breach of contract suits would raise again the danger of unfairness in the hasty adjudication of temporary injunction cases." Winter, *Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-LaGuardia,* 70 Yale L.J. 70, 99 (1960).

4. The basic theme of employers seeking to overrule *Sinclair* is that "an injunction is the only effective means of enforcing a no-strike clause." (Pet. Br. 15). The efficacy of the traditional remedies, damage and self-help, left open by *Sinclair,* is far more substantial than employers choose to acknowledge, see, e.g., *W. L. Mead, Inc.* v. *Teamsters,* 129 F. Supp. 313 (U.S.D.C. Mass., 1955), *affirmed* 230 F.2d 576 (C.A. 1st Cir., 1956) (employer awarded $359,000 as damages for strike over an arbitrable dispute). And these traditional remedies are not the sole means of protection open to management. While the employer in this case rushed into court for an injunction, other employers have secured a contractual remedy which is equally effective, but does not conflict with the policy of §203(d). They have obtained agreements providing for "quickie" arbitration procedures, see, *New Orleans Steamship Assn.* v. *ILA Local 1417,*

389 F.2d 369, 370 (C.A. 5th Cir., 1968), *cert. denied* 393 U.S. 828.

Enforcement of an award ordering an end to a work stoppage is consistent with the institutional interests of the courts protected by Norris-LaGuardia and by the federal law of labor arbitration, as it has been developed thus far:

> "The arbitrator has already determined that the strike is in breach of contract. Adjudication of the meaning of the no-strike promise and non-compliance with it has taken place. No independent substantive interpretation of the agreement is required of the court. All that is left for the court is to decide whether the strike which the award has ordered ended has been stopped." Dunau, *Three Problems in Labor Arbitration*, 55 Va. L. Rev. 427, 475 (1969).

Moreover, as the Courts of Appeals which have faced the question have recognized, see *New Orleans Steamship Assn.*, this form of relief is compatible not only with the policy considerations marshaled by the dissenters in *Sinclair*, but also with the majority opinion in *Sinclair*.

The burden of the argument to overrule *Sinclair* has been that injunctive relief against breach of contract strikes is necessary to preserve the integrity of arbitration. This argument overlooks the protean vitality of the arbitral process. That process has evolved a remedy which protects every relevant employer interest, and which fosters rather than disserves the policies of both Norris-LaGuardia and the LMRA. Section 203 (d) expresses the judgment that final methods of dispute settlement agreed upon by the parties are preferable to court litigation. The development of "quickie" arbitration confirms the wisdom of trusting to the capacity of the parties to labor agreements to solve their own problems. It also confirms the wisdom of the devotion to Congressional intent demonstrated by this Court in *Sinclair*.

ARGUMENT

SINCLAIR REFINING CO. v. *ATKINSON*, *370 U.S. 195 (1962)*, SHOULD BE REAFFIRMED

The question presented in the instant case is whether in light of §4 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. 101 *et seq.*, and §§203 (d) and 301 of the Labor Management Relations Act, 61 Stat. 136, 29 U.S.C. 151 *et seq.*, the federal district courts are empowered to enjoin breach of contract strikes at the behest of an employer.

Three basic answers have been offered to this question:

The first is that the status of Norris-LaGuardia's ban on injunctive relief against peaceful strikes and picketing was a critical issue in the debates on the LMRA, that these debates demonstrate that it was generally recognized in Congress that this prohibition was to remain in full force and effect unless specifically repealed, see, Winter, *Labor Injunctions and Judge Made Labor Law: The Contemporary Role of Norris-LaGuardia*, 70 Yale L.J. 70, 94-100 (1960); compare §§10(h), 10(j), 10(l) and 206, that it was also recognized by Congress that Norris-LaGuardia prohibited injunctions against breach of contract strikes, Winter, 70 Yale L.J. at 96, that §301 contains no explicit relaxation of Norris-LaGuardia, that the legislative history of §301 demonstrates that Congress squarely considered and rejected making Norris-LaGuardia inapplicable in §301 actions, and that it is therefore beyond the power of the courts to fashion an injunctive remedy against breach of contract strikes. This, of course, is the answer this Court, by a 5-3 vote, gave in deciding *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962).

The second answer is that the purpose of §301 was to enhance the remedies available for breaches of collective agreements, that the refusal to enjoin breach of contract strikes works to narrow employer remedies, and that the

proper approach is therefore to read §301 as rendering Norris-LaGuardia inapplicable where a breach of contract strike is alleged whether or not the underlying dispute is arbitrable. This is the answer offered by management when this problem was first before this Court, and it is the answer that was unanimously rejected in *Teamsters Local 795* v. *Yellow Transit Freight Lines*, 370 U.S. 711 (1962), see also, *Sinclair*, 370 U.S. at 224-225 (dissenting opinion):

> "[T]here is no general federal anti-strike policy; and although a suit may be brought under §301 against strikes which, while they are breaches of private contracts, do not threaten any additional public policy, in such cases the anti-injunction policy of Norris-LaGuardia should prevail."

The third answer is that §§203(d) and 301 stress the effective enforcement of arbitration agreements, that a strike over an arbitrable matter may threaten the smooth functioning of the arbitration machinery, and that the terms of the LMRA and its legislative history do not preclude an "accommodation" between Norris-LaGuardia and the LMRA which permits injunctions against breach of contract strikes where the underlying dispute is arbitrable. This is the position taken by the dissenters in *Sinclair* and rejected by the majority.

1. The arguments and counterarguments relating to the position taken in *Sinclair* have been effectively exhausted. The Court's holding in *Sinclair*, 370 U.S. at 203, 205-206, 209-210, is simple and straightforward:

> "[T]he Norris-LaGuardia Act deprives the courts of the United States of jurisdiction to enter [the] injunction [sought] unless, as is contended here, the scope of that Act has been so narrowed by the subsequent enactment of §301 of the Taft-Hartley Act that it no longer prohibits even the injunctions specifically described in §4 where such injunctions are sought as a remedy for breach of a collective bargaining agreement. Upon consideration, we cannot agree with that

view and agree instead with the view expressed by the courts below and supported by the Courts of Appeals for the First and Second Circuits that §301 was not intended to have any such partially repealing effect upon such a long-standing, carefully thought out and highly significant part of this country's labor legislation as the Norris-LaGuardia Act."

* * * *

"The failure of Congress to include a provision in §301 expressly repealing the anti-injunction provisions of the Norris-LaGuardia Act must be evaluated in the context of a statutory pattern that indicates not only that Congress was completely familiar with those provisions but also that it regarded an express declaration of inapplicability as the normal and proper manner of repealing them in situations where such repeal seemed desirable. . . . [Moreover] the legislative history of §301 shows that Congress actually considered the advisability of repealing the Norris-LaGuardia Act insofar as suits based upon breach of collective bargaining agreements are concerned and deliberately chose not to do so."

* * * *

"We think that the idea that §301 sanctions piecemeal judicial repeal of the Norris-LaGuardia Act requires acceptance of a wholly unrealistic view of the manner in which Congress handles its business. The question of whether existing statutes should be continued in force or repealed is, under our system of government, one which is wholly within the domain of Congress. When the repeal of a highly significant law is urged upon that body and that repeal is rejected after careful consideration and discussion, the normal expectation is that courts will be faithful to their trust and abide by that decision."

All arguments which could be summoned in opposition to this reasoning are stated in the dissent. The briefs of the Petitioner and the amici supporting reversal fail to develop a single argument or cite a single piece of legislative history that was not fully considered in 1962. Their briefs are a naked appeal for a reassessment of this Court's

determination as to what the legislative judgment had been in 1947. And this appeal is made without pointing to any development in the interim which would justify such a reassessment.

This Court's decision focused attention on the question of injunctive relief for breach of contract strikes and was an open invitation to legislative action. While neither the Petitioner nor the amici supporting reversal mention the point, the business community, which has ample resources to press its case in Congress, has in fact sought a legislative determination that this Court erred in *Sinclair*. As a result, a number of Bills have been introduced in Congress, see, e.g., S. 2132, 89th Cong., 1st Sess. (1965), and H.R. 9059, 89th Cong., 1st Sess. (1965). But Congress has refused to act. To us this alone should be decisive:

> "[B]ecause of the symbolic importance of the strike injunction in the politically sensitive area of labor-management relations, and because the strike injunction has been once explicitly rejected by the political process, . . . any change in its status should be made explicitly by Congress and the President. . . . The Court [has an obligation] to keep clear the channels of policy making and the lines of responsibility in a democratic society. This obligation can be fulfilled only if the judicial institutions confine their functions so as not to blur the distinction between interstitial lawmaking and dealing with the gristle of the body politic. Certain issues should be faced squarely by legislatures, and rules of statutory interpretation are, among other things, instruments for inducing such confrontation and instruments for the protection of the people from the courts and the courts from the people." Wellington and Albert, *Statutory Interpretation And The Political Process: A Comment On Sinclair* v. *Atkinson*, 72 Yale L.J. 1547, 1566 (1963).

By 1962 the major authorities as to both Norris-LaGuardia and the federal labor arbitration policy had been rendered. There have been no subsequent decisions of this Court which have changed the legal situation as it was

understood at that time. The Chamber of Commerce's argument (Br. 3-6) to the contrary, citing the ruling in *Avco Corp.* v. *Local 735 Machinists*, 390 U.S. 557 (1968), which allows removal of state court suits for labor injunctions, as one which has changed the context of this problem, is without merit. The dissent in *Sinclair* raised the question or removal and argued it fully, see 370 U.S. at 227. Thus *Sinclair* was decided with full appreciation of this ramification of the result reached.

Finally, while there are no statistics on the number of breach of contract strikes, the statistics on the total number of work stoppages during the term of a contract prior and subsequent to *Sinclair* have remained remarkably stable, compare, U.S. Dept. of Labor Bulletin No. 1339, *Analysis of Work Stoppages 1961*, Table 16 (Stoppages during the term of a contract accounted for 10.8% of the man-days idle because of strikes) with U.S. Dept. of Labor Bulletin No. 1646, *Analysis of Work Stoppages 1968*, Table 17 (Stoppages during the term of a contract accounted for 9.1% of the man-days idle). Thus, *Sinclair* has not precipitated a problem of unanticipated proportions, indeed there is nothing to indicate that it has had any deleterious effect at all.

In light of the above, the initial question here is simply whether *stare decisis* should govern.

Questions of statutory interpretaion form a continuum from situations involving the application of a generalized legal command to specific acts in the absence of any legislative history directly in point, see, e.g., *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963), *American Ship Building Co.* v. *National Labor Relations Board*, 380 U.S. 300 (1965), to those in which the Court after a full study of the relevant materials comes to the conclusion that Congress has focused on the exact problem and directed that it be resolved in a particular fashion. *Sinclair* is, of course, a paradigm of the latter.

The force of *stare decisis* is least compelling in the first class of cases. The ultimate justification for their authority is the soundness of their reasoning in light of the overall statutory policy being pursued. And it is recognized that the courts have a continuing obligation to perfect the law in light of new arguments, new decisions in other fields, and the experience gained under a particular decision.

Sinclair is not an expression of this Court's policy judgments in an area left open by Congress. It is an expression of judicial deference to the legislature in an area where the latter is preeminent, and an acknowledgement that any other course would be judicial usurpation, compare, *Edwards* v. *Pacific Fruit Express*, 390 U.S. 538 (1968), *Steel Workers* v. *Bouligny*, 382 U.S. 153 (1967). A reversal of such a decision does not have the principled justification that is available in the first class of cases noted above and it places a severe strain on relations between the legislature and the judiciary. Thus it is at this end of the continuum that the claims of *stare decisis* are most forceful.

The argument for *stare decisis* here is strengthened by the fact that the regulation of the economic weapons of management and labor, like economic regulation generally, has an inherent potential for doctrinal instability. These areas are characterized by "strong contending forces and deeply held views" *Local 1976 Carpenters* v. *National Labor Relations Board*, 357 U.S. 93, 99 (1958). These forces constantly seek to protect their self-interest with the weapons at hand. They are organized to take maximum advantage of the openings that are offered to them. If this Court follows a policy of adhering to decisions based on congressional intent, the thrust of the parties efforts will be directed toward legislative action and toward raising new issues and theories for judicial consideration. Thus such a course results in channeling the inherent dynamism of those interested in economic regulation in directions that

are consistent with the sound development of the law and with the institutional interests of the courts.

Naturally, once this Court indicates that it is willing to change that which has been deemed to have been settled by Congress, the parties, sensing the nature of their opportunity, will intensify the pressure for such changes in a variety of areas. The result will be to increase the resources being utilized to win lost legislative battles in the courts at the expense of legislative activity and of litigation designed to stimulate judicial innovations addressed to problems left open by Congress.

This Court has consistently maintained a heavy labor law docket, yet so far as we have been able to ascertain, there have been only three square reversals of prior precedents dealing with labor relations since 1950: *Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437 (1955), overruled in *Smith* v. *Evening News*, 371 U.S. 195 (1962); *Montgomery Trades Council* v. *Ledbetter Erection Co.*, 344 U.S. 178 (1952), overruled in *Local 438 Laborers* v. *Curry*, 371 U.S. 542 (1963); *International Union UAW* v. *Wisconsin Employment Relations Board*, 336 U.S. 245 (1947), overruled in *San Diego Trades Council* v. *Garmon*, 359 U.S. 236 (1959). And in each instance the overruling decision was simply the culmination of a series of intervening judicial developments. *Sinclair* should not be a fourth addition to this list.

2. Assuming that *stare decisis* does not control and that the issue presented here is to be viewed as *res nova*, the conclusion still follows that *Sinclair* should be reaffirmed. The essential legislative points are fully developed in *Sinclair*, see, pp. 8-9, *supra*, and, while we rely heavily upon them, we will concentrate on the argument that the dissent rather than the majority opinion is faithful to the overall design of federal labor policy.

We start from the position that the fundamentals of Norris-LaGuardia and the federal law of labor arbitration are basically consistent. The premise of both is that the judiciary is unsuited to the task of setting the basic substantive rules which govern the conduct of the parties to a labor dispute, and that the public interest is best served by the utilization of methods of dispute settlement other than litigation.

Enactment of Norris-LaGuardia constituted "clear disapproval of [the] free wheeling judicial exercises" which produced a "'general' labor law . . . based on self-mesmerized views of economic and social theory . . . and on statutory misconstruction" *Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 382-383 (1969), and its basic purpose was to limit the role of the judiciary by establishing a "'government hands off' philosophy of labor relations," Wellington & Albert, 72 Yale L.J. at 1555, see, 75 Cong. Rec. 4915 (Remarks of Sen. Wagner). This was considered necessary because a:

> "loss of [judicial] prestige [is] the unavoidable result of judicial interference in labor disputes, for such intervention leads to the assumption of partisan positions. While courts making law in areas such as tort or contract may draw upon generally accepted values, there are few such shared principles in the field of labor relations. Every decision tends to be a political statement favoring one camp or the other." Winter, 70 Yale L.J. at 75, compare, *Marine Cooks* v. *Panama S.S. Co.*, 362 U.S. 365, 370 n. 7 (1960).

Similarly, the basic element of federal labor arbitration law is the recognition that the courts are not well suited to the task of administering collective agreements: *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578, 580-582 (1960).

> "The collective bargaining agreement states the rights and duties of the parties. It is more than a con-

tract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . It is an effort to erect a system of industrial self-government. . . . Because of the compulsion to reach agreement and the breadth of the matters covered, as well as the need for a fairly concise and readable instrument, the product of negotiations (the written document) is, in the words of the late Dean Shulman, 'a compilation of diverse provisions; some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and good faith.' . . . [T]he grievance machinery under a collective bargaining agreement is [thus] at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the various needs and desires of the parties."

* * * *

"The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts. . . . The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in her personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed."

For this reason this Court has been astute in avoiding efforts to draw the judiciary into deciding the merits of arbitrable disputes. It has recognized that effectuation of the policy of §§203(d) and 301 calls for judicial action which to the maximum extent feasible simply remits the parties to the private tribunal they have set up for dispute settlement.

Thus, in *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 566 (1960), the Court rejected the theory of *Machinists* v. *Cutler-Hammer*, 271 App. Div. 917, aff'd 297 N.Y. 519, which required the courts to determine whether the "meaning of the provision of the contract sought to be arbitrated is beyond dispute" before ordering arbitration on the ground that "it could only have a crippling effect on grievance arbitration." And in *Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 596 (1960), it added:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. . . . The arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and pracices of a particular factory or of a particular industry as reflected in particular agreements."
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> "It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."

At the practical level, too, Norris-LaGuardia's ban on injunctive relief conforms to the way arbitration works. The argument that because *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 455-458 (1957), holds that Norris-LaGuardia does not forbid an order to compel arbitration, equality requires that it be held to authorize the injunction of strikes over arbitrable disputes, is without merit. Its underlying fallacy is the failure to recognize that an order to arbitrate is directed toward an adjudication after the event and does not restrain the employer from acting in violation of the agreement.

Under almost all collective agreements the employer is free to act in the first instance—to administer the agreement in accordance with his views as to its meaning. The order to arbitrate does not enjoin him from so doing. It only requires that he submit to an agreed-upon form of adjudication, after the fact, as to whether his actions violated the agreement. The comparable order against a union, alleged to have violated the agreement by striking, can only be an order directing it to arbitrate, not an injunctive order preventing it from taking the action which is alleged to be in violation of the agreement, see, *Publishers Ass'n. of N.Y.* v. *New York Mailers Union,* 314 F. 2d 624, 625 (C.A. 2nd Cir., 1963) *vacated on another issue* 376 U.S. 714; compare, *Sinclair,* 370 U.S. at 214.

There is, therefore, no lack of parity in the present situation. Norris-LaGuardia prevents either party from obtaining a judicial order requiring the other to conduct itself in accordance with the substantive provisions of the agreement; it permits either party to obtain against the other a judicial order requiring the use of the agreed-upon method of adjudicating whether actions that have been taken are in violation of the agreement, see, *Clure* v. *Publishers Assn. of N.Y.,* 314 F. 2d 343 (C.A. 2nd Cir., 1963), *affirming per curiam,* 214 F. Supp. 520 (U.S.D.C. S.D.N.Y., 1963).

The preclusion of injunctive relief is a prime safeguard of the integrity of the arbitration process. To permit a court to issue preliminary injunctive relief is to short circuit the arbitration procedure by allowing the court to administer the contract. It is the majority opinion and not the dissent in *Sinclair* which is faithful to *Lincoln Mills* and the *Steelworkers Trilogy.* The no-strike clause is not unique. There are contract breaches by employers which give rise to claims of irreparable injury to unions or employees that are at least as compelling as that made by the employer here. Given the particular concern of §4 of Norris-LaGuardia for the integrity of the strike, to allow injunctions against union

breaches of a no-strike clause while withholding the availability of prior restraints on the employer's promoting, demoting, discharging, making seniority adjustments, assigning overtime, subcontracting, retiming jobs, making work assignments, etc., in breach of his contractual obligations is to reverse the statutory scheme. Thus, while adoption of the *Sinclair* dissent's "accommodation" theory would be in the name of protecting arbitration, its result would undermine the essential working postulate of the system, which is that compulsion against either party from an outside source should come after rather than prior to adjudication on the merits.

3. As its form demonstrates, Norris-LaGuardia was not simply a repudiation of the substance of the general labor law evolved by the courts, it was also a condemnation of a particular procedural device—the injunction. In enacting Norris-LaGuardia "Congress was intent upon taking the federal courts out of the labor injunctions business," *Marine Cooks*, 362 U.S. at 369.

The premise of those who favor giving the district courts power to enjoin breach of contract strikes is that the pre-Norris-LaGuardia experience is a historical irrelevance because of the judiciary's increased sophistication in labor matters and because of the restraints placed on the court's decision making process by the terms of the collective agreement. These premises cannot withstand scrutiny.

The temporary restraining order and the preliminary injunction are inherently inappropriate methods for deciding labor disputes. Their disrepute is not the product of a particular era. As Prof. Aaron has noted, Aaron, *Labor Injunctions in the State Courts—Part II: A Critique*, 50 Va. L. Rev. 1147, 1156-1158 (1964).

> "Despite the numerous and extensive procedural reforms introduced by the Norris-LaGuardia Act and its counterparts in a number of states, it remains a

fact that the labor injunction, by its very nature, is a form of judicial power peculiarly subject to abuse. An injunction is ordinarily issued on the assumption that someone is committing an unlawful act which threatens irreparable harm to someone else, and for which there is no adequate remedy at law. If those were indeed the facts in every case the only arguments left to the opponents of the injunction would be those against the morality or legality of the statute or public policy which declared the actions enjoined to be unlawful—arguments which I eschew. But the facts of a typical labor dispute which reaches the litigation stage are usually tangled and unruly; as any arbitrator knows the conflicting statements and allegations of the parties in complicated cases must be carefully sifted and evaluated before one can be reasonably certain of arriving at even an approximation of the truth. Indeed, it often happens that after the most exhaustive exploration of a complex dispute, the arbitrator still entertains substantial doubts that he is in possession of all the relevant facts. In his effort to get at them, however, he is aided by a more informal procedure than that which prevails in the courtroom, and he can often pursue indirect lines of inquiry which past experience, or the offhand remarks or behavior of witnesses, indicate may prove fruitful. The arbitrator's proper concern, as Dean Harry Shulman used to say, is not that he may hear too much that is irrelevant, but that he may not hear enough that is relevant."

"Consider the sharply contrasting position of a trial judge hearing an application for a temporary restraining order. Frequently, as we have seen, he will entertain the application in an ex parte proceeding, possibly on the basis of affidavits and argument, without testimony. It is safe to assume that in most instances he will have only slight familiarity, if any, with industrial relations practice; and frequently, he will have only meager knowledge of labor law. Add to these disadvantages a crowded docket prompting a perfectly natural desire to get rid of the case, and it becomes apparent that there is little chance that the judge will probe deeply enough beneath the plaintiff's allegations and the defendant's answers and become sufficiently

well informed about the case to reach a reasonable judgment concerning the need for a restraining order."

"If the case should subsequently go to a hearing on a motion for a preliminary injunction, the judge will take testimony, but the hearing will be subject to all the other handicaps mentioned above. In addition, though the rules of evidence will, perhaps, prevent the court from hearing much that is irrelevant, they will also practically always assure that he will not hear enough that is relevant."

"There is also another factor to consider. The study of injunctions in Los Angeles County showed a strong tendency on the part of judges who had granted temporary restraining orders not only to refuse modifications of such orders, but also to grant subsequent motions for preliminary injunctions in the same cases. This suggests that judges, like the rest of us, are not receptive to suggestions that they may have acted precipitously or incorrectly and should publicly confess error by reversing themselves."

"It seems more than likely, therefore, that many temporary restraining orders and premilinary injunctions are improperly issued, not because the judge is prejudiced, but because he is insufficiently informed. Sometimes the result is inconsequential to either party; in the case of certain deep-seated disputes, the judicial restraint of some outward manifestations of protest may intensify the conflict and delay the ultimate solution, but it will not destroy the defendant's position. In a great many, if not the majority, of cases, however, the restraining order or preliminary injunction spells defeat for the defendant's cause. Every objective study of injunctions in action since publication of the pioneer work by Frankfurter and Greene has noted this result. Such a result is wrong, not because we can be sure that the defendant's cause is just and its objectives lawful—they frequently are not—but because the judicial power has been used prematurely and unfairly to aid one party to a private dispute."

Strikes do not come neatly labeled as breach of contract strike over an underlying matter which is subject to arbitra-

tion and which after balancing the equities should be enjoined. There are four dimensions to the problem of when, and what type, of an injunction should be issued.

First, is there a breach of the no-strike clause? Initially, there are limitations imposed by public law. A strike in response to certain unfair labor practices is protected activity under *Mastro Plastics Corp.* v. *National Labor Relations Board,* 350 U.S. 270 (1956). In any given case to ascertain whether unfair labor practices occurred and whether they meet the *Mastro Plastics* standard is likely to be a complex undertaking. A work stoppage over abnormally dangerous conditions is not a strike, §502, see, *National Labor Relations Board* v. *Knight Morley Corp.,* 251 F. 2d 753 (C.A. 6th Cir., 1957), *cert. denied,* 357 U.S. 928 (1958). The determination of what is an abnormally dangerous condition is, of course, a subtle and difficult one.

In addition, many no-strike provisions contain exceptions or limitations, express or implied. "Despite the widespread prevalence of grievance and arbitration procedures and no-strike pledges, a strike not constituting a violation of the letter of the agreement is possible in about half of all major agreements," U.S. Dept. of Labor Bulletin No. 1425-6, *Major Collective Bargaining Agreements, Arbitration Procedures,* 91 (1966). Because of the complex nature of collective agreements, see pp. 14-15, *supra,* it is by no means easy to determine the limits of these exceptions, even when they are explicitly spelled out, see, *Ormet Corp.* v. *Steelworkers,* 72 LRRM 2268 (U.S.D.C. W.D. Pa., 1969), *injunction suspended pending appeal,* 72 LRRM 2510 (C.A. 3rd Cir., 1969). The problems are even more difficult if the contention is that the overall context demonstrates that the action in question was not a breach. For example, in *Drake Bakeries* v. *Local 50 Bakery Workers,* 370 U.S. 254, 266 (1962), the union argued that a refusal to work overtime was not an illegal work stoppage because the agreement did not impose a duty to do so. Thus in that case the mean-

ing of the no-strike pledge turned on the ultimate meaning of the contract.

Moreover, there are a variety of interpretative problems that do not fit any neat category. In *A. H. Bull S. S. Co.* v. *Seafarers,* 250 F. 2d 326 (C.A. 2nd Cir., 1957), there was a controversy as to whether the no-strike clause applied after the union properly reopened the contract to renegotiate certain wage rates. This case is particularly instructive because the granting of an injunction would have cut directly into the union's power to strike over the wage rates. The employer, obviously, had considerable incentive to obtain an injunction which would paralyze the use of economic power on this issue in the guise of enjoining a breach of contract. "The truth is that authorizing the issuance of a temporary injunction, as is frequently true of temporary injunctions in labor disputes, may effectively dispose of [the union's] rights and render entirely illusory the right to review" *Curry,* 371 U.S. at 550. And there are of course a variety of additional problems that could be cited at length, compare, Dunau, *Three Problems In Labor Arbitration,* 55 Va. L. Rev. 427, 465-467 (1969).

Second, assuming that the district court finds that the no-strike provision is applicable, the next question which must be faced is whether the underlying dispute is arbitrable. In cases in which there is an "all disputes" clause, this determination should not prove troublesome under the standards of the *Steelworkers Trilogy.* But one-third of the employees working under major collective bargaining agreements are not covered by such clauses:

> "A total of 348 agreements, covering 2.2 million workers, [out of a total 1,717 agreements covering 7.5 million workers] identified one or more dispute issues as nonarbitrable. The reasons for such exclusions usually were not indicated by the agreements and, although they may have been fully understood by the parties, they are not always clear to outsiders reading

> the agreements. Some exclusions undoubtedly were intended to preserve certain management prerogatives, others to preserve union prerogatives . . . underlying many exclusions was a strongly held belief of one or both parties that the issue in question was too important or too subtle to be entrusted to a decision of a third party." U.S. Dept. of Labor, Bulletin No. 1425-6, at 11.

We have appended the relevant language of three major agreements—General Motors-UAW, General Electric-IUE, and Alcoa-Steelworkers—to give the Court a cross-section of this type of clause In each instance, the exact limits of what has been made subject to, and what has been specifically excluded from, arbitration remains ambiguous. This ambiguity is enhanced by the fact that these categories are not watertight; a dispute that generates enough feeling to bring about the threat of a walkout will often have a number of components and each party will emphasize the aspect of the total controversy that furthers its position. This is illustrated by the jockeying for position between the Ormet Corp. and the Steelworkers in the dispute which led to the *Ormet* case, 72 LRRM 2268. The letters setting forth the parties' positions in that case are set out as Appendix B hereto.

Third, if the district court finds that there is a breach of contract strike over an arbitrable matter, its task is not finished. Under *Locomotive Engineers* v. *M.K.T.R.R. Co.*, 363 U.S. 528, 531-532 (1960) it is now settled that in hearing an application for an injunction against such a strike the district court in order "to ensure that extraordinary equitable remedies will not become the engines of injustice" is

> "free to exercise the typical powers of a court of equity, it has the power to impose conditions requiring maintenance of the status quo. Conditions of this nature traditionally may be made the price of relief when

> the injunctive powers of the court are invoked and the conditions are necessary to do justice between the parties. 'The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff. . . . [The court] will avoid . . . injury so far as may be, by attaching conditions to the award. . . .' Yakus v. United States, 321 U.S. 414, 440."

Finally, the no-strike clause is a code of conduct for both the union as an institution, and for the individual employees it governs, *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 246 (1962). To implicate the union in the breach it is necessary to show that it initiated, authorized or condoned the work stoppage in some way, see, e.g., *Metro East Journal*, 66-3 ARB ¶8855 (1966). If the union has met its obligations the order to return to work must run against the individual employees. The district court, rather than the employer thus becomes the agency which requires employees to work against their will. The utility of such a role is questionable, Dunau, 55 Va. L. Rev. at 465, and the damage that it would have on the prestige of the courts is plain to anyone who remembers the effects of "government by injunction." That propelling the courts into the settlement of wildcat strikes can exacerbate the underlying controversy is illustrated by what transpired in *National Airlines* v. IAM, 416 F.2d 998, 1002 (C.A. 5th Cir., 1969).

The short of it, as Prof. Winter has stated, 70 Yale L.J. at 99 is that:

> "Authorizing strike injunctions in breach of contract suits would raise again the danger of unfairness in the hasty adjudication of temporary injunction cases. While contract law presents a more precise standard than the old common law of labor, doctrines created under section 301, arising out of the labor-management struggle and colored by it, are likely to lack the precision of principles derived from commercial contract law. The Supreme Court has recently held that the

> common law of labor agreements cannot always be based upon traditional notions of contract. Even direct application of commercial precedents to the loosely-drawn, frequently ambiguous collective agreements will present problems not amenable to hasty decision."

Moreover, there is nothing to demonstrate that the district courts are significantly more sophisticated about labor disputes today than they were in 1932, see p. 14 *supra*. The few post-*Sinclair* to have reached this Court do nothing to set unease at rest. In the instant case, the trial court acted as though *Sinclair* did not exist. Its action certainly is at odds with the argument that the district courts can be relied on for their discretion and self restraint. The performance of the district court in *ILA* v. *Philadelphia Marine Trade Assn.*, 389 U.S. 64, 74, 76 (1967), was equally distressing:

> "On its face, the [District Court's] decree appears merely to enforce an arbitrator's award. But that award contains only an abstract conclusion of law, not an operative command capable of 'enforcement.' When counsel for the union noted this difficulty and sought to ascertain the District Court's meaning, he received no response. Even at the contempt hearing on March 1, the union was not told how it had failed to 'comply with and . . . abide by the [Arbitrator's] Award,' in accordance with the District Court's original order."
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> * * * *
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> "The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. . . . We do not deal here with a violation of a court order by one who fully understands its meaning but chooses to ignore its mandate. We deal instead with acts alleged to violate a decree that can only be described as unintelligible. The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension."

And in *Avco* an *ex parte* injunction issued upon the filing of the complaint with no notice or opportunity to be heard

extended to the defendants. The allegations of the complaint were accepted at face value, despite no supporting showing other than a conclusory verification by the affiant that "he has read the foregoing bill, and that the allegations thereof are true except those made on information and belief, and these he believes to be true." Also accepted on faith was the complaint's representation that "Each and every alleged grievance above described should have been handled under the grievance procedure outlined in the collective bargaining agreement, and each suspension of work was in violation thereof." The *ex parte* injunction that issued ran not only to the Union and its agents, but to all members as well, and it ran to them not only when acting in concert, but also when acting individually. The injunction was not limited to a suspension of work over matters submissible to the grievance and arbitration procedure. Nor was the injunction limited to a suspension of work, but extended to "any interruption of operations," and any interference with the "normal conduct" of business for the duration of the agreement, see Record in No. 445 Oct. Term, 1967, 8-10. Accordingly, the consequence of the injunction there, had it been affirmed would have been that for the duration of the agreement its administration would be overhung by an omnipresent judicial decree with two thousand workers citable for contempt for its alleged violation.

4. The basic theme of employers seeking to overrule *Sinclair* is that "an injunction is the only effective means of enforcing a no-strike clause" (Pet. Br. 15). The truth of this assertion is far from self-evident. Despite Prof. Cox's sage advice *(id.* at 15n. 11), employers do sue for damages and they do collect, see, e.g., *W. L. Mead, Inc.* v. *Teamsters,* 129 F. Supp. 313 (U.S.D.C. Mass., 1955), *affirmed* 230 F.2d 576 (C.A. 1st Cir., 1956) (Employer awarded $359,000 as damages for strike over an arbitrable dispute). "Unions are as little enchanted as any other institutions by the risk of a damage judgment which may empty or deplete

their treasuries," Dunau, 55 Va. L. Rev. at 465. Thus as Senator Taft correctly stated in connection with §303, damage suits are "a powerful deterrent," 2 Legislative History of the Labor Management Relations Act, 1365. And while employers claim that their disciplinary powers are ineffective in briefs attempting to overrule *Sinclair* (Chamber of Commerce Br. 14), they take a different view when they counsel each other as to the proper course to follow in contract negotiations. In that context they state:

> "Disciplining individual strikers is one of the most effective methods of preventing future contract breaches by a wildcat strike. Fortunately, most arbitrators have not seen fit to dilute the no-strike pledge when confronted with breaches thereof; plainly considered, an employee's engagement in a wildcat strike is considered to be a most serious act of misconduct." Edwards and Bergmann, *The Legal and Practical Remedies Available to Employers to Enforce a Contractual "No-Strike" Commitment*, 21 Labor L.J. 3, 5 (1970).

Thus the efficacy of the traditional remedies, damages and self-help, left open by *Sinclair* is far more substantial than employers choose to acknowledge. And these traditional remedies are not the sole means of protection open to management. While the employer in this case rushed into court for an injunction, other employers have secured a contractual remedy which is equally effective, see, Edwards and Bergman, Labor L.J. at 4, 14-15, but does not conflict with the policy of §203(d). They have obtained agreements providing for "quickie" arbitration procedures. For example, the contract in *New Orleans Steamship Assn.* v. *ILA Local 1417*, 389 F. 2d 369, 370 (C.A. 5th Cir., 1968), *cert. denied* 393 U.S. 828, provided as follows:

> "The parts of the agreement which are involved in this dispute are a no strike clause, an arbitration clause, and a clause empowering the arbitrator to issue a desist order. They provide in pertinent part:

(a) *No Strikes—No Lockouts*

"There shall be no strikes, work stoppages, nor shall there be any lockouts.

(b) *Disputes Procedure and Arbitration*

"The parties accept the principle that any dispute involving the interpretation or application of the terms of this agreement shall be resolved in an orderly and expeditious manner. They commit themselves to the procedure outlined below. Failure by either party to staff and maintain the permanent disputes committee provided for herein and failure to deal with disputes under the disputes procedure shall constitute a violation of this agreement.

• • • •

(d) Either party to a dispute may by-pass the procedure leading up to arbitration and obtain arbitration forthwith whenever a violation of sections (a) and/or (b) of this Article shall be alleged. In this event, a notice of such allegation shall be made by telegram to the other party and to the arbitrator. The arbitrator shall hold a prompt hearing within seventy-two (72) hours after receipt of the notice and shall render an award within twelve (12) hours after the hearing. In such case, the arbitrator shall make findings of fact concerning the alleged violation and shall prescribe appropriate relief, including an order to desist therefrom.

The arbitrator in this matter served by virtue of his inclusion on a panel of six permanent arbitrators selected by the parties to serve for the duration of the agreement. On October 5, 1965 appellant notified the arbitrator that appellees had engaged in work stoppages and requested a hearing within 72 hours as provided in the agreement, Article XVIII, § (d), supra. A four day hearing was held commencing on October 8, 1965. The award was entered on December 13, 1965. The arbitrator found that stoppages had occurred in violation of the contract and sustained appellant's grievance. He directed appellees, their officers, agents, representatives and members to "• • • cease and

desist from work stoppages in violation of their contract * * *"

The sole criticism employers level at "quickie" arbitration is that "it is somewhat less convenient than the traditional approach of obtaining ex parte orders directly from courts," Edwards and Bergman, 21 Labor L.J. at 15. Since it is datum that: "The restraining order and preliminary injunction involved in labor disputes reveal the most crucial points of legal maladjustment. The temporary injunctive relief without notice, or, if upon notice relying upon dubious affidavits, serves the important function of staying defendant's conduct regardless of the ultimate of justification of such restraint." Frankfurter and Green, The Labor Injunction, 200 (1930), this seems a small price to pay.

Enforcement of an award ordering an end to a work stoppage is consistent with the institutional interests of the courts protected by Norris-LaGuardia and by the federal law of labor arbitration, as it has been developed thus far:

> "The arbitrator has already determined that the strike is in breach of contract. Adjudication of the meaning of the no-strike promise and non-compliance with it has taken place. No independent substantive interpretation of the agreement is required of the court. All that is left for the court is to decide whether the strike which the award has ordered ended has been stopped. If it has not been stopped, and if the award is within the arbitrator's power and free of serious prejudicial procedural irregularity, the injunction would order that the strike end. If the defense interposed is that the strike in progress is a different one from that which the award terminates, the court must decide that question. If the court finds that it is the same strike, the strike injunction would issue; if the court finds that it is a different strike—one to attain an end other than that covered by the arbitrator's ruling—no injunction would issue. The latter case would present a new matter for initial determination by the arbitrator." Dunau, 55 Va. L. Rev. at 475.

Finally, as the Court of Appeals which have faced the question have recognized, see, *New Orleans Steamship Assn.*, 389 F.2d 369; *Philadelphia Marine Trade Assn.*, 368 F.2d 932, this form of relief is compatible not only with the policy consideration marshaled by the dissenters in *Sinclair* but also with the majority opinion in *Sinclair:*

> "The end product of an arbitration proceeding is a determinative award. While Congress might better have relied solely on voluntary compliance, LMRA section 301 has left that alternative behind. Section 301's minimum meaning in placing sanctions behind a collective bargaining agreement is exaction of obedience to an award. An award ordering a strike to end and rendered in accordance with an agreement authorizing its issuance is in precise keeping with the parties' own means of ordering their relationship. Such an agreement expresses the parties' decision that termination of the stoppage in compliance with the arbitrator's order is the proper way to assure performance of the no-strike promise. They have chosen not to rely on good faith, or on discharge or discipline of breach-of-contract strikers, or on damage suits. They want obligatory specific performance. Their particular promise can therefore only be given effect by a strike injunction compelling compliance with the cessation-of-strike award. In this situation, LMRA section 301 would be a dead letter were it not to include a strike injunction as the sanction to enforce the disobeyed award. To bar the strike injunction because of section 4(a) of the Norris-LaGuardia Act would *pro tanto* nullify LMRA section 301." Dunau, 55 Va. L. Rev. at 474.

There is, of course, little chance that the ameliorative effects of "quickie" arbitration will be realized if *Sinclair* is reversed. Employers know that "the courts have rendered [the labor injunction] a potent weapon" when given the chance, Wellington and Albert, 72 Yale L.J. at 1553. Just as history has conditioned the labor movement to be wary

of the courts, it has conditioned employees to embrace litigation as a preferred method of settling disputes. It is only the impetus of *Sinclair* that has brought management toward even a limited acknowledgment of the policy of §203(d) and of *Lincoln Mills* and the *Steelworkers Trilogy*:

> "Until recently many employers' counsels have refused to agree to grievance and arbitration clauses which gave the company, as well as the union, a right to raise a grievance for a breach of contract. The reason for this has been the requirement that a party to a collective agreement must first exhaust his contract remedies before seeking court redress. Thus, under contracts permitting filing of grievances by a company, the union could insist upon the company first exhausting the grievance procedure before resorting to legal action.
>
> "However, since the Supreme Court's decision in *Avco Corporation* v. *Aero Lodge No. 735, IAM*, employers have found advantage in being able to file and process a grievance under the so-called 'quickie arbitration' procedure, in order to secure an arbitrator's cease and desist order against a wildcat strike." Edwards and Bergman, 21 Labor L.J. at 4.

The burden of the argument to overrule *Sinclair* has been that injunctive relief against breach of contract strikes is necessary to preserve the integrity of arbitration. This argument overlooks the protean vitality of the arbitral process. That process has evolved a remedy which protects every relevant legitimate employer interest, and which fosters rather than disserves the policies of both Norris-LaGuardia and *Lincoln Mills*. Section 203(d) expresses the judgment that final methods of dispute settlement agreed upon by the parties are preferable to court litigation. The development of "quickie" arbitration confirms the wisdom of trusting to the capacity of the parties to labor agreements to solve their own problems. It also confirms the

wisdom of the devotion to Congressional intent demonstrated by this Court in *Sinclair*.[1]

CONCLUSION

For the foregoing reasons, as well as those stated by Retail Clerks Union Local 770, the decision below should be affirmed.

Respectfully submitted,

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[1] The District Court not only issued its own injunction it refused to quash the State Court injunction obtained before removal. Thus this case presents the question left open in *Avco*. It seems plain that a reaffirmance of *Sinclair* leads to the conclusion that Norris-LaGuardia requires the Federal Courts to quash a State Court labor injunction; any other result would be a "juridicial absurdity," Dunau, 55 Va. L. Rev. at 472. Indeed the strength of this point is such that the Petitioner does not even argue the contrary, and the Chamber of Commerce (Br. 6 n. 4) all but concedes it.

APPENDIX A

I. The Alcoa—Steelworkers Agreement

ARTICLE XV. ARBITRATION

Section 46. Scope

Not all grievances are subject to arbitration. The scope of arbitration and the jurisdiction of the Board of Arbitration are defined in Section 51.

Grievances may be submitted to arbitration by either party after the grievance procedure has been exhausted subject to the following principles and procedure:

• • • •

Section 51. Jurisdiction of Board

A. The Board shall regard the provisions of this Agreement as the basic principles and fundamental law governing the relationship of the parties. The Board's function is to interpret the provisions of the Agreement and to decide cases of alleged violation of such provisions. The Board shall not supplement, enlarge, diminish, or alter the scope or meaning of the Agreement as it exists from time to time, or any provisions therein nor entertain jurisdiction of any subject matter not covered thereby (except to the extent necessary to determine its jurisdiction). Without limiting the foregoing, the subjects of wages (including incentives), production standards, and contracting out are by this Section excluded from arbitration, except that wage rates are arbitrable for new or changed job classifications under Article IV of this Agreement, and except that questions of compliance with Article III (Continuation of Wage Rates) are arbitrable.

B. Whenever the Board may determine that the subject of a dispute is, or a decision or award thereon would be, beyond the Board's jurisdiction, or would contravene this Section 51, it shall dispose of the case by reducing such determination to writing and may then refer the dispute to the parties.

C. The Board shall not take jurisdiction of any dispute or grievance arising under any prior agreements.

II. The General Motors—UAW Agreement

Powers of the Umpire

(46) It shall be the function of the Umpire, after due investigation and within thirty days after submission of the case to him, to make a decision in all claims of discrimination for Union activity or membership and in all cases of alleged violation of the terms of the following sections of this Agreement and written local or national supplementary agreements on these same subjects: Recognition; Representation; Grievance Procedure; Seniority; Disciplinary Layoffs and Discharges; Call-In Pay; Working Hours; Leaves of Absence; Union Bulletin Boards; Establishment of New Plants; Strikes, Stoppages and Lockouts; Wages, except Paragraph (97); General Provisions; Apprentices; Skilled Trades; Vacation Pay Allowances; Holiday Pay; Paragraphs (79) through (79f), relative to procedures on Production Standards; Paragraph (79h); and of any alleged violations of written local or national wage agreements. The Umpire shall have no power to add to or subtract from or modify any of the terms of this Agreement or any agreements made supplementary hereto; nor to establish or change any wage; nor to rule on any dispute arising under Paragraphs (78) through (78d), (79g) or (79i) regarding Production Standards. The Umpire shall have no power to rule on any issue or dispute arising under The Waiver Section or the Pension Plan, Insurance Program and Supplemental Unemployment Benefit Plan Section, except with respect only to the question of whether a discharged employe should receive a supplemental allowance pursuant to Section 8 of Article II of the Pension Plan (Exhibit A-1). Any case appealed to the Umpire on which he has no power to rule shall be referred back to the parties without decision.

III. The General-Electric-IUE Agreement

XV—Arbitration—1. Any grievance which remains unsettled after having been fully processed pursuant to the provisions of Article XIII, and which involves either,

(a) the interpretation or application of a provision of this Agreement, or

(b) a disciplinary penalty (including discharge) imposed on or after the effective date of this Agreement, which is alleged to have been imposed without just cause,

may be submitted to arbitration upon written request of either the Union or the Company, provided such request is made within 60 days after the final decision of the Company has been given to the Union pursuant to Article XIII, Section 2(c). For the purpose of proceedings within the scope of (b) above, the standard to be applied by an arbitrator to cases involving disciplinary penalties (including discharge) is that such penalties shall be imposed only for just cause.

2. (a) A request for arbitration shall state in reasonable detail the nature of the dispute and the remedy requested. A copy of the request shall be sent to the American Arbitration Association.

(b) Within 30 days after receipt of a request to arbitrate the receiving party will give its response thereto in writing, with a copy to the Association, stating whether or not it believes the stated dispute to be arbitrable. If the receiving party believes the dispute not to be arbitrable, it will state its reasons in reasonable detail.

(c) If the response agrees to the arbitrability of the dispute, the Association will proceed to process the request in accordance with Section 3.

(d) If a response to a request for arbitration disagrees as to arbitrability of the dispute, either party may request a conference to discuss the arbitrability of the dispute, and to seek to resolve the differences between the parties.

3. (a) When a request for arbitration involves only relief from a disciplinary penalty or discharge alleged to have been imposed without just cause, or involves a dispute which the Company admits to be arbitrable, or when a final court judgment shall have ordered arbitration of a request, the Association shall submit the appropriate matter promptly to one of the Contract Arbitrators listed below for scheduling of a hearing thereon.

• • • •

4. (a) In the event the receiving party has asserted that the dispute contained in a request for arbitration is not arbitrable, the Association shall have authority to process the request for arbitration and appoint an arbitrator in accordance with the procedure set forth in Section 3 above only after a final judgment of a Court has determined that the grievance upon which arbitration has been requested raises arbitrable issues and has directed arbitration of such issues. The foregoing part of this Section shall not be applicable if the request for arbitration involves only relief from a disciplinary penalty or discharge alleged to have been imposed without just cause.

(b) In the consideration and decision of any question involving arbitrability (including any application to a court for an order directing arbitration), it is the specific agreement of the parties that:

(i)Some types of grievance disputes which may arise during the term of this Agreement shall be subject to arbitration as a matter of right, enforceable in court, at the demand of either party. (See Section 6 below.)

(ii) Other types of disputes shall be subject only to voluntary arbitration, i.e., can be arbitrated only if both parties agree in writing, in the case of each dispute, to do so. (See Section 7 below.)

(iii) This Agreement sets out expressly all the restrictions and obligations assumed by the respective parties,

and no implied restrictions or obligations inhere in this Agreement or were assumed by the parties in entering into this Agreement.

(iv) In the consideration of whether a matter is subject to arbitration as a matter of right, a fundamental principle shall be that the Company retains all its rights to manage the business, including (but not limited to) the right to determine the methods and means by which its operations are to be carried on, to direct the work force and to conduct its operations in a safe and effective manner, subject only to the express limitations set forth in this National Agreement, Local Seniority Supplements executed under the provisions of Article XI thereof, and Local Understandings executed in accordance with Sections 3 of Article XXI thereof; and it is understood that the parties have not agreed to arbitrate demands which challenge action taken by the Company in the exercise of any such rights, except where such challenge is based upon a violation of any such express limitations (other than those set out in Section 7 below).

(v) No matter will be considered arbitrable unless it is found that the parties clearly agreed that the subject involved would be arbitrable in light of the principles of arbitrability set forth in this Article and no court or arbitrator shall or may proceed under any presumption that a request to arbitrate is arbitrable.

(c) If a final judgment of a court has determined that a request raises arbitrable issues, the court's decision shall specify in reasonable detail the issues as to which arbitration is directed. The arbitration shall thereafter proceed only upon the issues specified in such final court judgment and the arbitrator shall have no authority or jurisdiction to consider issues other than those specified.

6. (a) Arbitration as a matter of right includes only requests to arbitrate which involve:

(i) Disciplinary action (including discharge) but with

certain exceptions spelled out in this Article:

(ii) The claimed violation of a specific provision or provisions of the National Agreement (with the limitations and exceptions set out in this Article);

(iii) The claimed violation of a provision or provisions of a signed Local Seniority Supplement entered into in accordance with Article XI, Section 2 of this National Agreement or of a provision or provisions of a Local Understanding entered into in accordance with Article XXI, Section 3 of this National Agreement.

(b) A request for arbitration, in order to be subject to arbitration as a matter of right under the provisions of subsection (a) (ii) and (a) (iii) above, must allege a direct violation of the express purpose of the contractual provision in question, rather than of an indirect or implied purpose. For example, a request which claims incorrect application of the method of computing overtime pay under the provisions of Section 2 of Article V would be arbitrable as a matter of right, whereas a request which questioned the right of the Company to require the performance of reasonable overtime work, on the claimed ground that Article V contains an implied limitation of that right, would be subject only to voluntary arbitration. A request that Article XI and the appropriate Local Seniority Supplement had been violated by the layoff of a senior employee in reference to a junior employee would be arbitrable as a matter of right but a request that subcontracting of work in the plant while bargaining unit employees are on layoff violated a claimed implied limitation of Article XI and the applicable Local Seniority Supplement would be subject only to voluntary arbitration.

7. All requests for arbitration which are not subject to arbitration as a matter of right under the provisions of Section 6 above, are subject only to voluntary arbitration. In particular, it is specifically agreed that arbitration re-

quests shall be subject only to voluntary arbitration, by mutual agreement, if they

(a) Involve the existence or alleged violation of any agreement other than those described in 6(a) above.

(b) Involve issues which were discussed at national level negotiations, but which are not expressly covered in this National Agreement (e.g., subcontracting).

(c) Involve claims that an allegedly implied or assumed obligation of this National Agreement has been violated.

(d) Involve claims that Article I, or Section 3 of Article IV of this National Agreement has been violated.

(e) Would require an arbitrator to consider, rule on or decide the appropriate hourly, salary or incentive rate at which an employee shall be paid, or the method (day, salary or incentive) by which his pay shall be determined. (See footnote.)

(f) Would require an arbitrator to consider, rule on or decide any of the following:

(i) The elements of an employee's job assignment;

(ii) The level, title or other designation of an employee's job classification;

(iii) The right of management to assign or reassign work or elements of work. (See footnote.)

(g) Would require an arbitrator to determine the method or data to be used by the Company in setting an incentive price or standard. (See footnote.)

(h) Involve claims of violation of Sections 1 and 2 of

Footnote: Subsections e, f, and g above reflect the fact that this National Agreement does not set out specific rates or classifications for jobs, and are designed to confirm the intent of Article VI, Section 1 and Article VI, Section 5 (first sentence) that disputes over individual job classifications, rates of pay, incentive standards, etc., are assigned by the parties to local negotiations, and not to arbitration.

Article XI, in locations in which a Local Seniority Supplement has not been signed in accordance with Section 2 of Article XI.

(i) Pertain in any way to the establishment, administration, interpretation or application of Insurance, Pension or Savings Plans, or other Benefit plans in which employees covered by this Agreement are eligible to participate;

(j) Involve discipline or discharge imposed on employees having less than six months of continuous service with the Company, provided that if by Local Understanding a period of less than six months has been agreed upon as the probationary period for new employees, and such Local Understanding is applicable to the particular employee involved, such agreed upon shorter period of time shall be substituted for "six months" in the foregoing; and provided further that nothing in this subsection shall limit the authority of an arbitrator with respect to disciplinary penalties or discharges imposed in violation of Section 1 of Article IV.

(k) Pertain in any way to Article XXII of this Agreement or its interpretation or application.

(l) Pertain in any way to the provisions of any local agreement covering a retraining program under the provisons of Article XXIV hereof, or the interpretation or application thereof.

8. In any case which involves discipline (including discharge) effected on the ground that an employee has refused, orally or otherwise, to perform an assigned task, either party may, at any time before the arbitration hearing is closed, request that the arbitrator decide the matter without an opinion, in which event the arbitrator must simply determine and announce an award without stating any grounds or reasons for his decision. If an award is issued by an arbitrator in any such case, it shall be final and binding on the parties, but, to the extent that the arbitrator's

opinion in support of his award interprets or applies any provision of the 1966 GE-IUE National Agreement, such opinion shall not be considered binding upon the parties, and shall not constitute a precedent for the purpose of interpreting or applying that provision of the Agreement in the future.

APPENDIX B

July 30, 1969

Mr. Homer E. Bussa, Director
District No. 23
United Steelworkers of America
412 Central Union Building
Market & 14th Streets
Wheeling, West Virginia 26003

Dear Mr. Bussa:

Your letter of July 24, 1969, addressed to the President of Ormet Corporation, has been referred to me for reply.

This is to advise you that Grievances No. 1419 and No. 1459 raise issues involving the interpretation and application of the collective bargaining Agreement between our Company and your Union; and, accordingly, are arbitrable under the terms of the collective bargaining Agreement.

In particular, Grievance No. 1419 involves the interpretation and application of Article III, Paragraph "B," and Article XVIII of the Agreement. Grievance No. 1459 involves the question as to whether subcontracting made necessary by a refusal of employees to perform work assignments comes within the scope of Article XXX and whether, irrespective of this, the Company in any way violated Article XXX.

Since Grievances No. 1419 and No. 1459 present arbitrable disputes; and, in view of the failure of the Union to appeal these grievances to arbitration, we are by this letter appealing these grievances to arbitration as we have a right to do under Article XXII, Paragraph "A" of the collective bargaining Agreement. We are hopeful that your representatives will promptly meet with Company representatives for the purpose of selecting arbitrators to hear and determine these grievances in accordance with Paragraph "B" of Article XXII of the Agreement.

In view of the fact that the two grievances referred to in your letter of July 24, 1969, are arbitrable under the terms of the Agreement, any strike by your Union would be in violation of Article XXII, Paragraph "F" of the Agreement. Should such a strike occur, we would hold your Union fully responsible for any damage we might suffer as a result of such illegal action. We trust that such a law suit will not be necessary.

Sincerely yours,
ORMET CORPORATION
H. M. O'Brien, Manager
Industrial Relations

August 25, 1969

Mr. H. M. O'Brien
Manager, Industrial Relations
Ormet Corporation
P.O. Box 176
Hannibal, Ohio 43931

Dear Mr. O'Brien:

I am writing in response to your letter of July 30, 1969. An analysis of that letter reveals that you have misconstrued the nature of the grievances filed by the Union as well as the applicable provisions of the collective bargaining agreement presently in effect between the parties.

A brief summary of the relevant events in question may be helpful to place the situation in proper focus. First, as you know, on June 16, 1969, the Company issued a written directive to the Hobart welding crews unilaterally increasing the production requirement to "a minimum of twenty repaired stubs per manshift", advising that this minimum "must be achieved in order to earn an early shower", and threatening to take "appropriate disciplinary action" if "twenty welds per manshift were not achieved without proper cause". In direct response to and for the purpose

of protesting this newly established production standard for rod assembly welders in the rodding room, the Union filed grievance No. 1419.

As reflected most particularly in the Union's statement of position at the fourth step and the Company's response thereto, it is self-evident that both parties recognize that the crux of this serious contract dispute is the Company's newly established production standard and not, as your letter of July 30 now suggests, simply a controversy concerning the meaning of the wash up time provision (Art. III B) of the agreement.

Indeed, as concerns grievance No. 1419, it is only with respect to such changed production standards that we have asserted our right to strike. Insofar as there is a wash up time controversy it is an incident of and solely the result of the Company's mentioned unilateral change in production standards. To the extent grievance No. 1419 involves a wash up time dispute we are prepared to arbitrate that limited dispute. However, as concerns the major element of grievance No. 1419—namely, the dispute over the changed production standards which is at the heart of the employees' discontent—we reiterate our contractual right to strike at the appropriate time under the contract.

The agreement (Art. XXII) explicitly provides (at paragraph C) that "the subjects of . . . contracting out and production standards are by this section excluded from arbitration . . .". Consistent therewith, the agreement further provides (at paragraph F) that in lieu of arbitration, the Union has a right to strike, *inter alia*, over these two non-arbitrable issues, subject to the requirement that it follow a prescribed grievance procedure and then give the Company sixty days notice in writing.

The Union has complied with the procedural prerequisites to striking over the production standards dispute (See our letter of July 24, 1969) and, accordingly, any strike which

subsequently occurs because of the Company's aforementioned newly established production standards will not violate the no strike provision of the agreement. (See Art. XXII, paragraph F).

We now turn our attention to grievance No. 1459. That grievance relates, plainly and simply, to the Union's protest of the Company's action (commencing on or about June 25, 1969) in contracting out the repairing of rod assembly stubs without Union approval. That contracting out lies at the heart of this dispute is reflected, once again, by the Company's own statement of position in the fourth step disposition where you attempted to justify your decision to contract out this work on economic and operational grounds.

Article XXII of the agreement, as quoted above, is likewise clear and explicit—"contracting out" disputes are excluded from arbitration and, conversely, the Union has a right to strike over such disputes in accordance with the procedures set forth in paragraph F thereof. This is precisely what the contract says and means.

Accordingly, the belated attempt in your letter of July 30 to carve out an *exception* to this right to strike over a contracting out dispute in circumstances where subcontracting is allegedly made necessary by the alleged refusal of the employees to perform their work assignments is unavailing. The language of the agreement is not susceptible to any such strained construction. Irrespective of the motivating force behind the Company's decision to contract out work, once a dispute arises because of that decision the Union has a right to strike in protest of the contracting out.

I would hope that you will recognize and appreciate, as you must under the contract, the soundness of the Union's legal position and the seriousness of our intention to strike in protest of the Company's newly established production standards and the contracting out of repairing rod assembly stubs. Accordingly, I would urge that you withdraw your

request for arbitration of the production standards dispute of grievance No. 1419 and the contracting out dispute of grievance No. 1459. They do not present arbitrable issues; and for this reason we shall not join in your request to submit them to arbitration.

Needless to say, none of my foregoing comments are relevant to the third set of grievances filed by the Union (i.e. group grievance No. 1479) to protest the disciplinary action imposed upon numerous individual employees in the carbon rodding department for their alleged "constribution to (the) sub-standard quantity of work". Those grievances raise separate questions and are, without question, arbitrable.

Sincerely,
Homer E. Bussa, Director
District 23